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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

314 U.S. 679

No. [redacted] 90

JOGGER MANUFACTURING CORPORATION,
Petitioner-Plaintiff,

vs.

WENDELL H. ROQUEMORE, doing business as MULTIGRAPH SALES AGENCY,
Respondent-Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

SIDNEY NEUMAN,
Counsel for Petitioner.

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Respondent-Defendant.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, JOGGER MANUFACTURING CORPORATION, prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Seventh Circuit entered March 6, 1941 (R. 449).

A certified transcript of the record in the case, including the proceedings in the Circuit Court of Appeals, is furnished herewith in accordance with Rule 38 of the rules of this Court.

Summary Statement of the Matter Involved.

This is a suit brought by petitioner against respondent for infringement of two patents issued to Russell W. Borrowdale and now owned by petitioner. Patent No. 1,694,638 (R. 229) relates to a jogging attachment for printing presses, and is hereinafter referred to as the "first patent." Patent No. 1,863,465 (R. 237) relates to an automatic jogger, and is hereinafter referred to as the "second patent." Validity of the patents in suit was not contested in either the Trial or Appellate Courts. The Answer of respondent (R. 14) raised only the issue of infringement and the defense of license by reason of the fact that the joggers sold by him were manufactured by the Addressograph-Multigraph Corporation, the successor to the American Multigraph Company, to whom the petitioner's predecessor company had granted a fully paid license under the patents in suit. The granting clause of the license thus pleaded by way of defense reads as follows (R. 191-2):

> "1. Jogger hereby grants unto Multigraph the exclusive license to make, use and sell joggers known as models 112 and 1121 and embodying the invention of said patent or any re-issue thereof, and of any patent that may be issued on said application or any division, renewal or reissue thereof, and of any patents that may hereafter be owned by Jogger on any improvements thereof, or substitutions therefor, throughout the United States and foreign countries, and to the full end of the term of each of said patents, provided, however, that Multigraph shall have no right to manufacture said Joggers for M-24 and Multicolor type presses."

Petitioner relies upon claim 2 of the first patent and all of the claims of the second patent as having been infringed by respondent.

Petitioner's case is that the license to the Multigraph Company was restricted by its terms to Models 112 and 1121 joggers (for the manufacture of which petitioner sold the Multigraph Company the necessary drawings, tools, dies and parts); that these two named models differed from each other only in size; and that the license contract, because granting rights only to these two named jogger models, conveyed no immunity for the manufacture and sale of different jogger models of different sizes. For purposes of trial and of appeal, one jogger, Model 873, which had been sold by respondent, was produced before the Court and shown to differ from the original licensed Models 112 and 1121 in the height and length of the frames and the width between the side frames, these differences in size being designed to fit Model 873 to a different sized press than those to which the licensed models were adapted. The functional structure of Model 873 was identical with that of the Models 112 and 1121 which were named in the license contract.

The District Court (Barnes, J.) found that the inventions of the claims relied upon in both patents were embodied in the accused device; that the license contract was clear and unambiguous, granting a license only as to joggers of the sizes of the named models, to-wit, Models 112 and 1121; and that Model 873 differed in size from the licensed models and was, therefore, an infringement (R. 205-214). Accordingly, the usual interlocutory decree was entered awarding petitioner an injunction and accounting of profits and damages (R. 214-5).

On appeal by respondent, the District Court was reversed (R. 449). The Court of Appeals found that the Model 873 was "within the protection of the license grant" (R. 446) and that petitioner had "sold its business" to the licensee (R. 442), although also holding that

the license was limited to "the office equipment field" (R. 443, 445).

As further ground for the decision, the Court of Appeals found that neither patent was infringed by Model 873, although it also stated that "all the joggers are the same" (R. 443) except for size. Thus the Court's views on the non-infringement of Model 873 would be equally pertinent as to Models 112 and 1121 for which a license was expressly purchased for a consideration of $9,250.00 (R. 446-8).

Claim 2 of the first patent was found not infringed because the elements thereof describing the mounting on the frame for the jogger arms are not found *as separate pieces* in any of the commercial models. Instead these elements are cast in one piece integrally with the frame. The Court held that this fact avoided infringement, although on the day before its decision in petitioner's case, the Court had held, in *Sutherland Paper Co.* v. *Auburn Carton Corp.*, 48 U. S. P. Q. 612, that infringement was not avoided by making in two pieces what the patent claim specified as one piece.

Claim 1 of the second patent (and presumably the similar claims 4 and 5) were found not infringed because the commercial models (a) use the much cheaper cam instead of a "shroud" to limit the teeth of the ratchet wheel engaged by the pawl, and (b) two reciprocating arms are used rather than the one called for by the claim.

Claims 2 and 3 of the second patent were found not infringed without any individual consideration and despite the inability of respondent to indicate any element thereof not exactly reproduced in the accused device.

This petition seeks a review of the action of the Court of Appeals in creating a new contract inconsistent with the language of that adopted by the parties, and in violating the rules of patent construction established by this Court and the Courts of Appeals. The present inconsistency in the decisions of the Court of Appeals for the Seventh Circuit in patent cases makes it impossible for the patent practitioner and the public to know the actual state of the law. According to the instant case, infringement is avoided by making in one part what the claim specifies as two. According to the *Sutherland Paper* case, the opposite rule is the law. The Court of Appeals declined on petition for rehearing to resolve the conflict in its own decisions.

Jurisdiction.

1. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347).

2. The date of the decree which petitioner seeks to review is March 6, 1941 (R. 449).

3. The petition for rehearing, filed March 20, 1941, was denied April 14, 1941 (R. 485).

4. Among cases believed to sustain jurisdiction to issue the writ are:

General Talking Pictures Corp. v. *Western Electric Co.*, 304 U. S. 175;

Altoona Publix Theatres, Inc. v. *American Tri-Ergon Corp.*, 294 U. S. 477.

Questions Presented.

1. Whether the limitation in the license grant to identified jogger models of particular size was not a proper and enforceable restriction on the immunity from suit thereby granted, conveying no right to manufacture, use or sell a jogger differing in size from those named in the license.

2. Whether petitioner must go remediless from a decision by the Court of Appeals predicated upon numerous mistakes of fact (both as to the language of the license contract and as to the facts shown by the testimony), when such mistakes of fact were pointed out in the petition for rehearing wherein the true facts were shown by references to the record, but the Court of Appeals denied rehearing without comment.

3. Whether the Court of Appeals has erred by finding, without discussion, non-infringement of two claims in suit which cover subject matter different from that covered by the claims discussed by the court, when the respondent's device is identical with the representation in the patent drawings of the subject matter covered by the ignored claims.

4. Whether the Court of Appeals did not err, in finding non-infringement of the claims considered by it, by ignoring the pertinent rules of construction established by applicable decisions of this Court, and by adopting the theory that infringement is avoided by making several elements in one piece thus rendering a decision in direct conflict with *Sutherland Paper Co.* v. *Auburn Carton Co.*, 48 U. S. P. Q. 612, decided by the same Court only one day earlier.

Reasons for Granting the Writ.

The discretionary power of this Court to grant a writ of certiorari is invoked upon the following reasons:

1. The Court of Appeals has construed a license to manufacture, use and sell two specified machines embodying the inventions of the patents in suit to be a general license under the patents, limited only to the licensee's "field" of business, in violation of the plain terms of the contract, thus creating a precedent which throws doubt and uncertainty upon the scope of all license agreements restricted on their face to specified models or sizes of the patented device, and raising an important question of general public interest and concern never decided by this Court.

2. The action of the Court of Appeals, in predicating its construction of the license contract upon a mistaken view as to the language of that contract and upon assumptions of fact contrary to the evidence, and in refusing to modify or recede from these mistakes upon petition for rehearing, is a departure from the accepted course of judicial proceedings which calls for the exercise by this Court of its power of supervision to insure the administration of justice in the lower courts.

3. The Court of Appeals, by failing to consider claims 2 and 3 of the second patent in suit, covering only a restricted portion of the disclosed subject matter, which portion is utilized by respondent in the exact form shown in the patent drawings, acted in violation of the rule laid down by its own decision in *Sanitary Dist. of Chicago* v. *Activated Sludge, Inc.*, 90 F. (2d) 727 (C. C. A. 7), and in conflict with the decision of this Court in *Altoona Publix Theatres, Inc.* v. *American Tri-Ergon Corp.*, 294 U. S. 477, 487, to the effect that each claim of a patent

must be considered separately, and, in result, construed claims 2 and 3 of the second patent in suit so narrowly as to hold them not infringed by a device incorporating every element of these claims in the identical form shown in the patent drawings.

4. The decision of the Court of Appeals, finding no infringement of claim 2 of the first patent and claims 1, 4, and 5 of the second patent, is in conflict with decisions of this Court and of Courts of Appeals, including the decision of the Seventh Circuit Court of Appeals in *Sutherland Paper Co.* v. *Auburn Carton Corp.*, rendered within a day of the decision in the instant case.

5. By ignoring the findings of the lower court, including a finding of the credibility of petitioner's only witness, whose testimony conflicted with that of respondent's witnesses in many respects, and by failing to show wherein these findings were "clearly erroneous," the Court of Appeals has failed to comply with Rule 52 (a) of the Federal Rules of Civil Procedure, and has acted in conflict with its own decision in *Webb* v. *Frisch*, 111 F. (2d) 887, 888.

WHEREFORE, it is respectfully submitted that the petition for writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit should be granted.

JOGGER MANUFACTURING CORPORATION,
By SIDNEY NEUMAN,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, was delivered orally December 29, 1939, and appears in the record at pages 205-9. It was not reported.

The opinion of the Court of Appeals for the Seventh Circuit was filed March 6, 1941, and appears in the record at pages 442-8. It has not yet been reported in the Federal Reporter but only in 48 U. S. P. Q. 614.

Jurisdiction.

See Petition for Writ of Certiorari, (*supra*, page 5)

Statement of the Case.

The essential facts and issues of the case are stated in the accompanying Petition for Writ of Certiorari and in the interest of brevity are not repeated here.

Specification of Errors.

The errors which petitioner will urge if the writ of certiorari is issued are that the Court of Appeals for the Seventh Circuit erred:

1. By holding that the license agreement furnished immunity from suit for infringement by the sale of jogger Model 873, which is of different size than the Models 112 and 1121 therein licensed.

2. By failing to hold that a license limited to two named models, differing from each other only in size, does not license other models of a different size.

3. By holding that claim 2 of the first patent is not infringed because elements of the claim are in the accused device cast integrally in one piece.

4. By holding that claims 1, 4 and 5 of the second patent are not infringed because (a) a cam has been substituted for the shroud of the claim, and (b) two reciprocating arms are used instead of one as called for by the claim.

5. By holding, without any statement of reasons, that claims 2 and 3 of the second patent are not infringed by the accused device which, in the respects covered by these claims, is identical with the disclosure of the patent.

6. By failing to hold that all the claims in suit are infringed.

7. By failing to give due weight (or any weight) to the findings of the District Court who heard the testimony, saw all the witnesses, and made a finding of the credibility of petitioner's sole witness, as well as findings based on conflicting testimony.

Summary of Argument.

Petitioner adopts its "Reasons for Granting the Writ" set forth in the petition (*supra,* pp. 7-8) as a summary of its argument. In the interest of brevity these points will not be repeated here but will be discussed in the argument in the order set forth in the petition.

ARGUMENT.

Point 1. The Court of Appeals Has Construed a License to Manufacture, Use and Sell Two Specified Machines Embodying the Inventions of the Patents in Suit to Be a General License under the Patents, Limited Only to the Licensee's "Field" of Business, in Violation of the Plain Terms of the Contract, Thus Creating a Precedent Which Throws Doubt and Uncertainty Upon the Scope of All License Agreements Restricted on Their Face to Specified Models or Sizes of the Patented Device, and Raising an Important Question of General Public Interest and Concern Never Decided by this Court.

The sole right under the patents in suit, granted by the license, executed on August 10, 1931, relied upon by respondent, is contained in the following language (R. 191-2):

> "Jogger hereby grants unto Multigraph the exclusive license to make, use and sell joggers known as models 112 and 1121 and embodying" the inventions of the patents in suit.

For this grant of rights to two named models, the Court of Appeals has substituted a grant of rights to any size or model jogger useful in the "office equipment field," the field of business in which the licensee is engaged.

It is probably not excessive to say that in the United States at the present time there are in force and effect hundreds of licenses on their face limited to specified models or sizes of devices embodying the licensed inventions. Prior to the instant case such licenses have been interpreted according to their plain and clear meaning. With the decision of the Court below standing uncorrected, however, a precedent has been established creat-

ing doubt and uncertainty as to the meaning of these contracts, and a fertile source of conflict has been created. We believe that the question of the proper construction of licenses of this character has never been passed upon by this Court but that it is a question of widespread public interest which justifies a review of the instant case on a writ of certiorari.

The error of the decision is manifest. On its face the language of the grant is clear and unambiguous and was so regarded by the District Court (R. 205). The language is not rendered ambiguous or uncertain by consideration of the nature of the subject matter involved or the other provisions of the contract.

Prior to the execution of the agreement the licensor had been manufacturing at least three different sized joggers known as Models 112, 1121 and M-24 (R. 68, 156). The Models 112 and 1121 had been manufactured and sold by petitioner to the Multigraph Company for attachment, respectively, to its 66 and 86 multigraphs (R. 68, 87). When the subject was first discussed of granting a license to the Multigraph Company so that it might manufacture the 112 and 1121 joggers for itself, rather than buy them from petitioner, the president of petitioner company offered a license of the 112 and 1121 joggers limited to the use of those joggers with the Models 66 and 86 multigraph (R. 204). This limitation was not agreed upon, and the contract as executed recites (R. 191) that Multigraph is desirous of obtaining a license to manufacture jogger Models 112 and 1121 "to be applied to their products as from time to time manufactured." The significance of this clause is shown by the testimony that the Models 112 and 1121 joggers were used not only with the 66 and 86 multigraphs but also with other presses: the 112 jogger with multilith Models

100 and 196; the 1121 jogger with multilith Model 206 and multigraph Model 57 (R. 79-81). The multilith machines were being developed at the time of the execution of the license contract (R. 72-3), and it was obviously for this reason that the restriction in use of the licensed joggers to the 86 and 66 multigraph was rejected and the understanding reached that these joggers might be applied to any products from time to time manufactured.

However, one exception to this broad field of permissible use was made in the granting clause of the license in the following language:

> "* * * provided, however, that Multigraph shall have no right to manufacture said Joggers for M-24 and Multicolor type presses." (R. 192)

Although the Multigraph Company was not then manufacturing M-24 and Multicolor type presses, it was in the process of merging with the Addressograph Company which was manufacturing them (R. 82-3, 161). Model 112 jogger could be and had been used previously with such presses (R. 157, 172, District Court Finding No. 13, R. 212) which were of the same width as Model 112 jogger (R. 124). Despite this uncontradicted fact, the Court of Appeals in part predicated its construction of the contract upon this proviso to the grant. The opinion states (R. 445):

> "Most significant is the fact that after granting to M Company the exclusive license to make joggers in paragraph 1, it excepted therefrom, in the same paragraph, 'joggers for M-24 and Multicolor type presses.' If M Company were restricted to a jogger of the exact sizes and dimensions of 112 and 1121, why except joggers which were not identical therewith. Yet joggers for M-24 and Multicolor type presses were excepted. If said grant were limited to the exact structures of 112 and 1121, the parties would not except two other known makes, neither of which was of the dimensions of 112 or 1121. * * *
> * * *

> "There is a fatal inconsistency between the provision which followed the words 'provided' and a construction of the contract which limited M Company to joggers of the exact dimensions of 112 and 1121. In other words, joggers for M-24 could not be used with the specific joggers known as 112 and 1121. Therefore, there could be no possible explanation for excepting 'joggers for M-24,' if it were not intended that M Company might make joggers of the kind *like 112 and 1121**, but differing in size from them."

In this quoted matter the Court made a grievous error: it disregarded the word "said" modifying "joggers" in the proviso, and treated this exclusion from the grant as an exclusion of "two other known makes" of joggers, *i. e.*, two models different from the 112 or 1121 models. This is a plain distortion of the English language. "Said joggers" in the proviso definitely relates to the previously mentioned joggers, to-wit, "joggers known as Models 112 and 1121." Given its clear meaning, there is no inconsistency in this clause as a whole. The proviso is not an exclusion of two known joggers from a broad grant but a limitation on the use to which two specific joggers may be put.

Another error of the Court in the matter above quoted is its statement that "joggers for M-24 could not be used with the specific joggers known as 112 and 1121." On its face this statement is meaningless, as one jogger is, of course, not used with another. Judging from the context, the Court intended to say that the 112 or 1121 joggers could not be used with the M-24 or Multicolor type presses. Such a finding would support the reasoning of the Court but would be contrary to the uncontradicted evidence (R. 157, 172).

A clear weakness of the opinion is that it recognizes, and finds "significant," the fact that the contract uses

* Italics in the original.

"models" and "types" in the plural (R. 445). This use of language might have been confirmed by the third "Whereas" clause of the contract which refers to "two types of joggers known as Models No. 112 and 1121." This plural use of "type" clearly is a recognition that the differences between Models 112 and 1121 demarked a difference in type, and as the only difference between these two models is one of size, "type" must be related to "size." The Court's decision, however, reduces the two types to one type.

Despite the fact that the language of the contract is clear and unambiguous, the opinion also, in part, is based upon the supposed conduct of the licensee in "making different sized frames for its joggers immediately after the sale and license contract was executed." This is a plain mistake. The license was executed in 1931, and the only evidence establishing a date for the sale of a jogger different in size from the licensed models is that on pages 101-2 of the record where it appears that Model 863 jogger was first sold with the Model 300 multigraph which was introduced in 1935 or 1936.

A similar error of fact is reflected by the statement in the opinion (R. 445) that

> "* * * it approaches the absurd to assume the parties restricted M Company to machines of the exact dimensions it used as attachments to its multigraph models 66 and 86, when, at the time, M Company had an additional model 57 and was preparing for the trade two or three other models which were not of the same dimensions and which were by it, later numbered 206, 296, and 300.
>
> "These different models called for different sized attachments."

The record does not support these statements. Each of the models named by the Court was used with either the

112 or 1121 jogger so far as this record discloses (R. 79-81) except the Model 300 multigraph which was first manufactured in 1935 or 1936 (R. 101-2). The only differences in the dimensions of the various models developed in 1931 shown by the evidence are differences in maximum size of the paper operated upon by them (R. 93). Despite these differences in paper size, the presses themselves were substantially the same width as either the 66 or 86 multigraphs (R. 72-3).

Over petitioner's objection (R. 66), respondent had introduced testimony by the Treasurer of the licensee to the effect that he had intended to acquire a license for use in the "office equipment field" (R. 71-2). In the Court of Appeals respondent contended (opinion, R. 443):

> "* * * that joggers were of two classes, one for use in the office equipment field and the other for the commercial printing field. Its license covered the first named field (the office equipment) with two exceptions provided in the last clause of paragraph one. M Company was engaged in the office equipment field only, * * *."

The Court held (opinion, R. 445):

> "* * * it (the Multigraph Company) was licensed by plaintiff to make, use, and sell models to be attached to such multigraphs in the office equipment field."

The words "office equipment field" are not to be found in the written contract.

In the light of prior decisions of the same Court of Appeals, its construction of the license can derive no support from the oral evidence of the licensee's intention or subsequent conduct. In *Kline* v. *Yokom,* 117 F. (2d) 370 (C. C. A. 7), the Court said (p. 373):

> "* * * when the instrument shows upon inspection a complete legal obligation without any uncer-

tainty or ambiguity as to the object and extent of the engagement, it is conclusively presumed that the whole agreement of the parties was included in the writing. Under such circumstances it is not permissible to establish by oral evidence a different contract from that expressed in the writing."

In *In re Chicago & E. I. Ry. Co.*, 94 F. (2d) 296 (C. C. A. 7), the Court said (p. 299):

"* * * The intention of the parties must be found in the language used to express such intention; and if the court finds as a matter of law that the contract is unambiguous, evidence of the intention and acts of the parties plays no part in the decision. The conduct of the parties may fix a meaning to words of doubtful import. It may not change the terms of the contract. * * *

"If by mistake the parties followed a practice in violation of the terms of the agreement, the court should not perpetuate the error."

As the language of the instant license is unambiguous, the ultimate conclusion of the Court can rest upon only one foundation, *i. e.*, that the designation of Models 112 and 1121 in the granting clause of the contract was merely by way of illustration of the class of joggers useful in the field of business of the licensee, and that such reference to specific models served only to restrict the license to the office equipment field.

By this decision the question is baldly presented whether patent licenses, in terms limited to designated models or sizes, nevertheless convey rights to all embodiments of the inventions useful in the same field as those models named. The patentee's right to grant a license restricted to a particular field of use has been upheld by this Court in *General Talking Pictures Corp.* v. *Western Electric Co.*, 305 U. S. 124, 127. Can he not also grant a

license restricted to the embodiment of the invention in specified models of particular size? While this question does not appear to have ever been decided by this Court, the principles enunciated in the *Talking Pictures* case fully confirm the propriety of such a restriction. The Court said (305 U. S., at p. 127):

> "The question of law requiring decision is whether the restriction in the license is to be given effect. That a restrictive license is legal seems clear. *Mitchell* v. *Hawley*, 16 Wall. 544. As was said in *United States* v. *General Electric Co.*, 272 U. S. 476, 489, the patentee may grant a license 'upon any condition the performance of which is reasonably within the reward which the patentee by the grant of the patent is entitled to secure.'"

This Court there gave effect to a restriction on use, and found a sale for use in a different field to be an infringement. The Court of Appeals for the Seventh Circuit has clearly erred in failing to give similar effect to the restriction in the license here involved.

Point 2. The Action of the Court of Appeals, in Predicating Its Construction of the License Contract upon a Mistaken View as to the Language of That Contract and upon Assumptions of Fact Contrary to the Evidence, and in Refusing to Modify or Recede from These Mistakes upon Petition for Rehearing, is a Departure from the Accepted Course of Judicial Proceedings Which Calls for the Exercise by This Court of Its Power of Supervision to Insure the Administration of Justice in the Lower Courts.

As above pointed out, the opinion of the Court of Appeals involves serious mistakes of fact. These mistakes are not conclusions drawn from conflicting evidence but assumptions of fact contrary to the only testimony in the record on these various points. In the petition for rehearing filed in the Court of Appeals, attention was clearly

directed to these errors and the correct facts were given with record references. Despite this showing, the petition for rehearing was denied without comment. Petitioner concedes that this Court cannot review on the merits the thousands of decisions of inferior courts annually rendered, but this Court will exercise its power of supervision when the lower court "has so far departed from the accepted and usual course of judicial proceedings* * * * *" as to merit a correction by this Court. In our view the substitution of assumptions for uncontroverted facts shown by the record is a gross departure from the accepted course of judicial proceedings.

Point 3. The Court of Appeals, by Failing to Consider Claims 2 and 3 of the Second Patent in Suit, Covering Only a Restricted Portion of the Disclosed Subject Matter, Which Portion is Utilized by Respondent in the Exact Form Shown in the Patent Drawings, Acted in Violation of the Rule that Each Claim of a Patent Must Be Considered Separately, and, in Result, Construed Claims 2 and 3 of the Second Patent in Suit So Narrowly As to Hold Them Not Infringed by a Device Incorporating Every Element of these Claims in the Identical Form Shown in the Patent Drawings.

No rule is better established by authority than that which states that each claim of a patent must be considered separately. In *Altoona Publix Theatres, Inc.* v. *American Tri-Ergon Corp.*, 294 U. S. 477, the Third Circuit Court of Appeals was reversed for upholding validity of a patent without an examination of the separate claims. The necessity for such an examination when validity is conceded and only infringement is in issue would appear equally imperative. This has heretofore been recognized by the Seventh Circuit Court of Appeals in *Sanitary Dist. of Chicago* v. *Activated Sludge*, 90 F. (2d) 727, 730,

* Rule 38, 5 (b) of the Rules of this court.

where the court said that the *Altoona* case reiterated the well-known rule:

> "* * * that each claim of a patent constitutes a separate grant of monopoly, and each must be considered by itself both with respect to validity and infringement."

The decision of the Court of Appeals in the instant case is in direct conflict with the *Altoona* and *Sanitary District* cases because it totally ignores claims 2 and 3 of the second patent in suit. Apparently the Court realized the deficiency of its opinion and attempted to brush it aside by inserting the following footnote to its statement that it would not go into the details of each claim (R. 448):

> "This opinion is written for the parties and their attorneys. Others seeking a complete copy of the two patents, the patents of the prior art, the drawings and the testimony, may find them in the office of the Clerk."

As attorneys for one of the parties we cannot deduce, either from the Court's opinion or from the record, any reason for the conclusion of no infringement of claims 2 and 3 of the second patent in suit. These two claims were treated separately by the lower court, which entered the following finding of fact (R. 211):

> "10. Claims 2 and 3 of the 1,863,465 patent are exactly duplicated in Model 873. Defendant has made no attempt to point out to the Court any elements in these claims which are not to be found in Model 873."

Likewise, in the Court of Appeals respondent made no attempt to point out any element in these claims not found in the accused model.

Point 4. The Decision of the Court of Appeals, Finding No Infringement of Claim 2 of the First Patent and Claims 1, 4, and 5 of the Second Patent, is in Conflict with Its own Prior Decisions and with a Decision of this Court.

The conclusion of the Court of Appeals of non-infringement of claim 2 of the first patent is in irreconcilable conflict with the decision of the same court rendered on the immediately preceding day in *Sutherland Paper Co.* v. *Auburn Carton Corp.*, 48 U. S. P. Q. 612.

Claim 2 contains among other elements the call for "brackets on the frame, longitudinal plates supported by the brackets each having downturned apertured ends" (R. 230). In the accused structure the brackets on the frame, and the longitudinal plates having downturned apertured ends are cast in one piece as part of the frame (R. 40-41; District Court Finding No. 7, R. 210). The longitudinal extension from the frame in the accused device has only one downturned apertured end, as frankly admitted by petitioner's president (R. 50), but the other downturned apertured end is supplied by the increased width of the frame itself having an aperture therein on the same level as the aperture in the downturned end of the longitudinal extension.

The sole function of the structure called for by the claim is to provide a mounting having two bearings for the reciprocating rod carrying the jogger plate. This function is achieved by the accused device in the identical manner. Respondent adduced no testimony on this point, did not put in evidence the file wrapper of this patent, and introduced the patents of the prior art relied upon as limiting the claims without any testimony whatsoever. Nevertheless, the Court of Appeals assumed that the claim in suit was narrowed in the Patent Office in view of the prior art and concluded that infringement was avoided because the brackets and longitudinal plates

were not found in the accused structure as separable pieces. This decision was rendered March 6, 1941.

On March 5, 1941, in the *Sutherland Paper* case the same court stated (48 U. S. P. Q., at p. 614):

> "The question of infringement is a narrow one. Did defendants avoid infringement by using two pieces of paper and gluing them together and thereby making one piece? For the purpose of determining infringement, defendants' two pieces, glued together, were one piece. Infringement was not avoided by using two pieces and gluing them together."

The inconsistency between these two decisions is plain.

Likewise, in *Ace Patents Corp.* v. *The Exhibit Supply Company,* 48 U. S. P. Q. 667, decided March 12, 1941, the Court of Appeals for the Seventh Circuit found infringement by a device made in two parts rather than the one claimed by the patent. Speaking of the defendant's structure, the court said (p. 671):

> "* * * In other words, they have transformed the pin table from a single solid board into a structure composed of a solid board with an overlying metal layer. They have separated one unit into two parts which perform the same function in identically the same manner, and we think infringement is clear."

These decisions undoubtedly express the correct rule, the converse of which is applicable in the case at bar. The requirement of the same Court in the instant case, that not only functions but also structure must be identical in order for infringement to exist, is clearly unwarranted. It throws in doubt one of the fundamentals of patent law which should be re-established by this Court.

Claims 1, 4 and 5 of the second patent (R. 239-240) were found not infringed for two reasons. The first is that these claims call for a "shroud adjustable on said ratchet wheel to predetermine the number of teeth thereof which are engageable by said pawl." For this shroud

the accused device substitutes an eccentric cam mounted upon the same shaft and adjustable in relation to the ratchet wheel in the same manner to achieve the identical purpose (District Court Finding No. 8, R. 211). The use of either a cam or a shroud for this purpose is fully taught by the prior patent art. Quade No. 1,306,024 (R. 382) and Baxter No. 1,438,213 (R. 392) each disclose a shroud used to disengage a pawl from a ratchet. Peters No. 1,239,817 (R. 332), Dudley No. 1,593,573 (R. 426), and Dexter No. 814,522 (R. 292) each disclose a cam used for the same purpose. The two things are therefore old and well-known equivalents coming within the doctrine announced by this court in *Imhaeuser* v. *Buerk,* 101 U. S. 647, at p. 656:

> "Patentees of an invention consisting merely of a combination of old ingredients are entitled to equivalents, by which is meant that the patent in respect to each of the respective ingredients comprising the invention covers every other ingredient which, in the same arrangement of the parts, will perform the same function, if it was well known as a proper substitute for the one described in the specification at the date of the patent. Hence it follows that a party who merely substitutes another old ingredient for one of the ingredients of the patented combination is an infringer if the substitute performs the same function as the ingredient for which it is so substituted, and it appears that it was well known at the date of the patent that it was adaptable to that use. *Gill* v. *Wells,* 22 Wall. 1, 28."

Heretofore the authority of the *Imhaeuser* case was recognized by the Court of Appeals for the Seventh Circuit in its decision in *United States Ozone Co.* v. *United States Ozone Co. of America,* 62 F. (2d) 881, 890. The doctrine was ignored by the Court of Appeals in the instant case.

The second basis for finding non-infringement of claims 1, 4 and 5 of the second patent is the presence in the ac-

cused structure of two reciprocating arms, one for direct connection with the actuating arm and one for direct connection with the jogging means, whereas the claim calls for "a reciprocating arm for direct connection with said actuating arm and said jogging means." No difference in function or manner of operation was even intimated by respondent below because of this duplication of parts. The finding that infringement was avoided for this reason is in square conflict with the two decisions by the Seventh Circuit decided during the same month as the instant case and above quoted, which held that the use of two parts rather than one, where no change in function or mode of operation resulted, did not escape infringement.

We cannot avoid the impression that the opinion of the Court was written to justify a conclusion reached on grounds not stated therein. The lack of all foundation for the conclusion of non-infringement, and indeed the lack of any necessity for that conclusion in view of the action of the Court in sustaining the defense of license, reveals an inconsistency in the decision itself. As the arrangement of parts in the accused device is identical with that in the licensed models 112 and 1121, the conclusion of non-infringement is a finding that the licensee was in error in ever paying petitioner for a license at all.

Point 5. By Ignoring the Findings of the Lower Court, Including a Finding of the Credibility of Petitioner's Only Witness, Whose Testimony Conflicted With That of Respondent's Witnesses in Many Respects, and by Failing to Show Wherein These Findings Were "Clearly Erroneous," the Court of Appeals Has Failed to Comply With Rule 52 (a) of the Federal Rules of Civil Procedure.

The District Court heard all the witnesses and entered detailed findings and conclusions which are not referred

to in the opinion reversing its decision. The credibility of petitioner's sole witness was expressly found, and the Court indicated its disbelief of some of respondent's witnesses (R. 207, 213).

Rule 52 (a) of the Rules of Civil Procedure, providing that findings of the lower court "shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses," was clearly intended to vest some persuasive effect in the judgment of the trial court under the circumstances of the case at bar. This persuasive effect was recognized by the Court of Appeals for the Seventh Circuit in *Webb* v. *Frisch,* 111 F. (2d) 887, 888, but was ignored in the case at bar.

We are aware that this Court has repeatedly declined to issue a writ of certiorari where the sole question presented was the failure of the Court of Appeals to reflect in its opinion any basis for determining that the findings of the lower court were clearly erroneous. The usual case however, presents conflicting evidence from which the District Court and the Appellate Court drew contrary inferences and conclusions. In the instant case the Court of Appeals has not drawn inferences or conclusions from the testimony in a manner contrary to the findings of the District Court but, ignoring those findings, it has likewise ignored the uncontradicted evidence in the case and substituted its own assumptions of fact to support its decision.

Some of these errors of fact were pointed out in our argument under Point 1, *supra.* Another which may be noticed here is the Court's assumption that by the license contract petitioner "sold its business" to the licensee (Opinion, R. 442, 443, 444). It is true that petitioner, in

the license contract, sold its drawings, tools, dies and parts used in the manufacture of Model 112 and 1121 joggers. Accordingly in a sense it sold its business in so far as it pertained to those joggers. In any more general sense, however, this finding is disproved by petitioner's retention of the right to manufacture joggers for the M-24 and Multicolor type presses and also its retention, conceded by the licensee's then Treasurer (R. 71) and by respondent below (see R. 456), of the right to furnish joggers for the Harris and Kelly presses which were utilized in the commercial printing field. These rights to manufacture joggers for the commercial printing field and for the M-24 and Multicolor presses necessarily refute the Court's assumption that petitioner sold its business by signing the license contract. The assumption is further refuted by the restriction in the license itself to two specific models—a limited grant which the Court of Appeals has construed as though it were substantially a broad license to manufacture, use and sell.

Conclusion.

The points above discussed are thought to show that the decision of the Court of Appeals (a) failed to give effect to a clear and unambiguous limitation in the license grant, substituting therefor, on the strength of the supposed intention and subsequent conduct of one party but in conflict with its own prior decisions, a qualification not found in the contract; (b) made many erroneous assumptions of fact contrary to uncontradicted evidence; (c) failed to give two claims the independent consideration demanded by its own prior decisions and by a decision of this Court; (d) violated established and fundamental rules of patent construction in conflict with its own prior decisions and with decisions of this Court;

(e) and, in violation of Rule 52 (a) and its own prior decision, completely ignored findings of fact and of credibility made by the District Court.

We respectfully submit that the decision of the Court of Appeals for the Seventh Circuit involving all of these errors is so far removed from the due exercise of the judicial function that the proper dispensation of justice demands a review by this Court.

Respectfully submitted,

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(18)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

No. 90.

JOGGER MANUFACTURING CORPORATION,
Petitioner-Plaintiff,

vs.

WENDELL H. ROQUEMORE, DOING BUSINESS AS MULTIGRAPH SALES AGENCY,
Respondent-Defendant.

REPLY OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI.

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Respondent-Defendant.

REPLY OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI.

Statement.

Petitioner's summary statement of the matter involved is inaccurate and insufficient in several respects. In the interest of brevity these are considered in our discussion of the reasons advanced by petitioner for the granting of the writ.

While petitioner invokes the jurisdiction of this Court under Section 240(a) of the Judicial Code as

amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347), the petition fails to present any recognized ground for the exercise of the jurisdiction of this Court under the provisions of that section. The action is one for infringement of letters patent and no conflict of decisions within the rule of *Keller* v. *Adams-Campbell Co.*, 264 U. S. 314, exists.

The petition presents four questions and advances five reasons for granting the writ. None of the questions thus presented is of such character as to require determination by this Court, and the stated reasons for granting the writ are wholly inadequate under established precedents. We shall discuss the points advanced in the argument of petitioner's supporting brief in the order in which they are presented.

ARGUMENT.

Point I.

The Court of Appeals Did Not Refuse to Enforce a License Restriction. Instead It Held that the License Was Not Restricted, as Petitioner Asserted.

The first question that petitioner propounds is whether the limitation in the license grant to identified jogger models of particular size was not a proper and enforceable restriction. This question has no basis in the record in this case. It assumes a limitation in the license grant which the Circuit Court of Appeals has held not to be present. Whether this question would be answered in the affirmative or negative is unimportant in this case, because it at no time became an issue either in the pleadings or in the presentation to either the District Court or the Circuit Court of Appeals. The decision in this case did not and does not depend

on any such issue since the Circuit Court of Appeals very properly decided that the license which was granted to the manufacturer under the license agreement was not limited to identified jogger models of a particular size. The Circuit Court of Appeals said:

> "In other words, M Company was not restricted to its so-called models 66 and 86, but, as and when the trade demanded different sizes, it could and would produce such Multigraphs, and it was licensed by plaintiff to make, use and sell models to be attached to such Multigraphs in the office equipment field" (R. 445).

Since this question here presented by petitioner was not for decision, nor was it decided by the lower courts, there is nothing for this Court to review.

In sustaining the defense of license, the Circuit Court of Appeals merely interpreted the terms of a written contract according to the intention of the parties as evidenced by the terms of the document itself so as to embrace the accused device. In so doing, it merely held that it was the intention of the parties as evidenced by the terms of the contract that the license grant was not restricted or limited as petitioner contended, but was broad enough to include devices such as that charged to be an infringement of the patents in suit. Obviously, contrary to petitioner's assertion, that determination involved no "important question of general public interest and concern never decided by this Court" and created no "precedent which throws doubt and uncertainty upon the scope of all license agreements restricted on their face to specified models or sizes of the patented device."

Petitioner's argument on this point is devoted mainly to a plea for the construction of the license con-

tract as it contended before the Circuit Court of Appeals. We do not understand that such argument is now in order.

Point II.

The Action of the Circuit Court of Appeals in Sustaining the Defense of License and Refusing to Accept the Interpretation of the Document for Which Petitioner Contends Involves No Departure from the Accepted Course of Judicial Proceedings Calling for the Exercise of the Supervisory Power of this Court.

The second question that petitioner propounds is whether it must go remediless when the decision by the Circuit Court of Appeals is predicated upon numerous mistakes of fact. Petitioner challenged the Circuit Court of Appeals' opinion on this ground in its petition for rehearing (R. 451). Respondent filed an answering brief to this petition and pointed out the testimony in the record which supported the findings of the Court which were challenged by the petitioner as being unsupported by the record (R. 477).

As we have stated the Court of Appeals interpreted the license contract according to the intention of the parties as evidenced by the terms of the document itself. It pointed to plaintiff's own conduct as supporting its view (R. 446). There is absolutely no basis for the claim that the Circuit Court of Appeals' decision is not supported by the testimony in the record.

That this question is not recognized as a sufficient ground for granting the writ is evidenced by the case of *General Talking Pictures Corporation* v. *Western Electric Co.*, 304 U. S. 175, 82 L. Ed. 1272, wherein this court said (p. 178):

"Whether respondents acquiesced in the infringement and are estopped depends upon the facts. Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U. S. 508, *United States* v. *Johnston*, 268 U. S. 220, 227."

Point III.

Petitioner's Third Question Is Not Only Predicated Upon a False Assumption But Involves No Substantial Reason for Granting a Writ.

The third question that petitioner propounds is in substance whether or not there was infringement of certain patent claims. Petitioner contends that the Circuit Court of Appeals failed to consider specified claims of the second patent in suit and thereby departed from the decision of this Court in *Altoona Publix Theatres, Inc.* v. *American Tri-Ergon*, 294 U. S. 477, 487.

The opinion clearly discloses that the Court went to unusual pains to show its reasons for non-infringement. Only one claim of the first patent was asserted. The Court discussed this claim quite extensively (R. 446). All five claims of the second patent were asserted. The Court took one claim as representative, discussed it in some detail (R. 447), and added (R. 448):

"Without going into the details of each claim we content ourselves with saying that plaintiff's patent is extremely narrow and its infringement is not shown."

Petitioner possibly confuses *consideration* with *discussion*. The Circuit Court of Appeals was clearly not

obliged to discuss each and every claim separately, as petitioner contends. The decisions of this Court show very clearly the fallacy of this contention.

In *Bassick* v. *Hollingshead,* 298 U. S. 415, ten claims were asserted, and but two discussed. In *Mantle Lamp* v. *Aluminum Co.,* 301 U. S. 544, ten claims were involved and but one claim discussed. In *Honolulu Oil Corp.* v. *Halliburton,* 306 U. S. 550, twelve claims were involved and but two discussed.

Moreover, this Court has repeatedly refused to grant a writ of certiorari on the question of whether or not there has been patent infringement in the absence of diversity of opinion between circuit courts of appeals.

In *Keller* v. *Adams-Campbell Co.,* 264 U. S. 314, 68 L. Ed. 705, the Court said (p. 319):

> "These passages . . . show that what the courts really held was that the defendants were manufacturing a different invention from that of the plaintiffs, and so could not and did not infringe. Such an ordinary patent case, with the usual issues of invention, breadth of claims, and non-infringement, this Court will not bring here by certiorari unless it be necessary to reconcile decisions of Circuit Courts of Appeal on the same patent."

In *Layne & Bowler Corporation* v. *Western Well Works,* 261 U. S. 387, 67 L. Ed. 712, the Court said (pp. 388-393):

> "This is an ordinary patent case. There was no reason for granting the application for a writ of certiorari except upon the ground that the Circuit Courts of Appeals for the Fifth and Ninth Circuits had differed in respect to the validity and scope of the patent, and that uniformity required a decision from this Court."
>
> ". . . it is very important that we be consistent

in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal."

In the very case on which petitioner relies, *General Talking Pictures Corp.* v. *Western Electric Co.,* 304 U. S. 175, this Court said (p. 178):

"Nor would the writ be granted to review the questions of anticipation and invention that petitioner argues, for as to them there is no conflict between decisions of circuit courts of appeals."

Point IV.

Petitioner's Claim that the Decision of the Court of Appeals Is in Conflict With Its Own Prior Decisions and With a Decision of this Court Is Based on a False Premise.

Petitioner's complaint is that certain claims of the patents were found not to be infringed because certain elements of these claims were not found as separate pieces in the devices sold by respondent and that this finding is in conflict with the Sutherland Paper case decided by the same Court a day before.

This ground of criticism is based on a false premise because the Court made no finding that these elements were not found "as separate pieces." The Court did find that certain elements of the claims were *entirely lacking* in respondent's structures. This decision followed many decisions of this Court such as *Dunbar* v. *Myers,* 94 U. S. 187, where the Court said (p. 202):

"it is settled law, that, where the respondent in

> constructing his machine omits one of the ingredients of the complainant's combination, he does not infringe the complainant's patent. *Gould* v. *Rees*, 15 Wall. 194; *Prouty* v. *Ruggles*, 16 Pet. 341; *Vance* v. *Campbell*, 1 Black, 427; *Gill* v. *Wells*, 22 Wall. 28."

In the *Sutherland Paper* case an entirely different question was involved. It is of course elementary that what a Court decides in one case on one set of facts can never be the basis for a review of another decision by that Court involving an entirely different set of facts.

The *Sutherland* case (118 F. (2d) 862) involved a claim calling for a piece of paper which was so folded as to provide a false bottom. The defendant, instead of using one piece of paper, glued two pieces together to make the false bottom, and the court held this did not avoid infringement. The other cases cited by petitioner are to like effect.

In the present case the only claim asserted of the first patent called for a combination of several specific elements, two of which were [4] brackets on the frame, and [5] longitudinal plates supported by the brackets, each having turned-down apertured ends. The Court found (R. 446):

> "Defendant's structures did not have a bracket attached to the frame nor was its frame attached to the bracket. It did not have downward turned apertured ends."

It is clear there was no holding by the court as stated in petitioner's brief (p. 21) "that infringement was avoided because the brackets and longitudinal plates were not found in the accused structure as separable pieces."

In discussing this patent, the Court said (R. 446):

> "It is fairly inferable from the prior art that plaintiff was required to narrow its claim and limit it to the disclosed and described invention which included elements 4 and 5."

In the second patent three of the claims call for a shroud mounted in a certain manner and a *direct* connection between certain parts. The Court found and the petitioner admits that respondent's device uses a cam instead of a shroud and the cam is not mounted in the manner called for in the claims. Hence there could be no infringement. It is also clear from the Court's Opinion and admitted by petitioner that the direct connection called for in the claims is not present in respondent's structure. The claims being limited to a direct connection, infringement is also avoided by using another kind of connection.

The Court then added (p. 448):

> "Without going into the details of each claim we content ourselves with saying that plaintiff's patent is extremely narrow and its infringement is not shown. Plaintiff's counsel has rather adroitly interchanged the functions and the elements of the accused device, thereby creating some confusion as to their equivalency. Functions may well be investigated and examined to ascertain the range of mechanical equivalents. But there is no basis for asserting infringement because of similarity of functions. There must be similarity of elements which perform the desired functions before infringement is shown. We find there was no infringement of the second patent."

It is clear that the Court applied the rule referred to on pp. 7, 8, *supra*, that in order to find infringement each element called for in the claims must be present in the defendant's structure and that where there are specific limitations in the claims which are not utilized by the defendant there can be no infringement.

We believe the limitations in the claims are clearly required by the prior art but whether or not the limitations are necessary is of no moment because the limitations are in the claims and cannot now be ignored.

This rule is especially applicable where, as here, the art is crowded and the claims of the patents are very narrow and consist of a large number of specific elements. An early and unchallenged decision in this court on this point is the case of *Keystone* v. *Phoenix,* 95 U. S. 274, where the court said (pp. 278-9):

> "Here, again, the patentees clearly confine themselves to 'wide and tnin' bars. They claim the use in truss bridges of such bars when the ends are upset and widened in the manner described. It is plain, therefore, that the defendant company, which does not make said bars at all, but round or cylindrical bars, does not infringe this claim of the patent. When a claim is so explicit, the courts cannot alter or enlarge it. If the patentees have not claimed the whole of their invention, and the omission has been the result of inadvertence, they should have sought to correct the error by a surrender of their patent and an application for a reissue. They cannot expect the courts to wade through the history of the art, and spell out what they might have claimed, but have not claimed. . . . But the courts have no right to enlarge a patent beyond the scope of its claim as allowed by the Patent Office, or the appellate tribunal to which contested applications are referred. When the terms of a claim in a patent are clear and distinct (as they always should be), the patentee, in a suit brought upon the patent, is bound by it. *Merrill* v. *Yeomans,* 94 U. S. 568. He can claim nothing beyond it. But the defendant may at all times, under proper pleadings, resort to prior use and the general his-

> tory of the art to assail the validity of a patent or to restrain its construction. The door is then opened to the plaintiff to resort to the same kind of evidence in rebuttal; but he can never go beyond his claim. As patents are procured *ex parte*, the public is not bound by them, but the patentees are. And the latter cannot show that their invention is broader than the terms of their claim; or, if broader, they must be held to have surrendered the surplus to the public."

Petitioner insists that there is an inconsistency in the Court of Appeals decision because on the one hand it holds the license covers all joggers for machines made by respondent's manufacturer and on the other holds that the joggers sold by respondent do not come within the claims of the patents included in the license.

The Court had two questions to decide—what did the license cover, and were the devices charged to infringe covered by the claims of the patents in suit? It answered both in accordance with the evidence. Although the Court having answered the first question, did not have to decide the second, nevertheless its decision as to infringement was not inconsistent with its decision as to what the license covered. Respondent's manufacturer had a *paid-up* license under which it could make joggers if it so desired. It does not follow that because it had this license it was obliged to, or did, make devices in accordance with the patents.

Point V.

Petitioner Claims that the Court of Appeals Erred in Failing to Follow the Findings of the District Court, Including a Finding of the Credibility of Petitioner's Witness, Without Showing Wherein Those Findings Were Clearly Erroneous as Required by Rule 52 (a) of the Federal Rules of Civil Procedure. The Court of Appeals Opinion Clearly and in Great Detail Discloses Wherein the District Court's General Findings Were Erroneous and the Non-Existence of Conflicting Testimony on Material Issues Made the Finding as to Credibility Immaterial.

The petitioner apparently realizes and concedes that the able and exhaustive decision of the Court of Appeals makes clear wherein that Court differed with the findings of the District Court, as petitioner makes no reference or explanation in its brief in support of the statement and claim that the Court of Appeals failed to show wherein the findings of the District Court were erroneous.

The finding relating to the credibility of petitioner's only witness is of no materiality in the final decision of this case. An examination of the statement of the material facts in this case discloses no substantial controversy of the parties with respect thereto. The facts upon which the Court of Appeals based its conclusion are not shown to have been in dispute. Petitioner makes the claim of error based upon alleged conflicting testimony, but does not set out in its petition for the writ any evidence which it claims was material and was the subject of contradictory testimony.

Characteristic of petitioner's claim that the Court of Appeals' opinion is based on assumptions of fact not supported by any evidence in the record is petitioner's objection under this point to the Court saying that petitioner "sold its business" (petitioner's petition for writ, p. 25). The record clearly supports the Court's opinion in this regard. By the terms of paragraph 2 of the license agreement dated August 10, 1931 (R. 192), the petitioner sold its drawings, tracings, prints, patterns, parts, castings, jiggs, tools and dies. The petitioner's president, when asked about the petitioner's business, testified that petitioner discontinued manufacturing joggers after the execution of the above mentioned license agreement (R. 60).

CONCLUSION.

Much of petitioner's argument is devoted to matters not pertinent to the questions presented in the petition. In view of the inhibition of Rule 38, we have refrained from discussing such matters.

The petition presents no ground for the exercise of this Court's jurisdiction. Petitioner's claims at the best are no more than an expression of dissatisfaction with the Court of Appeals opinion, which is fully sustained by the evidence in this case. Petitioner's objections were all fully and carefully considered by the Court of Appeals and rejected. We respectfully submit that there is no justification for the exercise by this Court of its power to grant a writ of certiorari.

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